



Appeal No. 2000369

DOITT v. City Bridge LLC

May 21, 2020

APPEAL DECISION

The appeal of Respondent, a public pay telephone (ppt) services provider, is granted.

Respondent appeals from a recommended master decision by Hearing Officer B. Lamel (Brooklyn), dated January 28, 2020, sustaining two violations of § 6-05(b) of Title 67 of the Rules of the City of New York (RCNY) for failing to provide working ppt services. Having fully reviewed the record, the Board finds that the hearing officer's decision is not supported by the law and a preponderance of the evidence. Therefore, the Board finds as follows:

Table with 5 columns: Summons, Law Charged, Hearing Determination, Appeal Determination, Penalty. Rows include summons 187221688 (88) and 187222146 (46) with details on law charged and determinations.

BACKGROUND

In the summonses, the issuing officers (IOs) affirmed observing that Respondent failed to provide working ppt and operator services at: 120 Fifth Ave., Manhattan (Manh.) on March 26, 2019 (summons 88); and 259 Tenth Ave., Manh. on March 19, 2019 (summons 46).

At the consolidated hearing held on January 24, 2020, the hearing officer reports in his decision as follows.1 The representative for Petitioner, Department of Information Technology and Telecommunications (DOITT), offered inspection reports (IR) for both summonses. Each ppt had been inspected three times during the course of one week and more than 24 hours apart. Petitioner's representative argued that: 1) Respondent's evidence of dial tone detection was insufficient to show that the ppts were operable during the intervals between the IOs' inspections; and 2) under 67 RCNY § 6-05(e), Respondent needed to show that it corrected the underlying problem preventing the ppts from working properly to establish a defense.

Respondent's representative argued that it was not in violation since each of the ppts had a dial tone during the week the ppt was inspected. In support, she submitted affidavits for both ppts from an employee of Labra Telecom Inc. (Labra), the company that services Respondent's ppts, which state that it calls the ppts to detect a dial tone and if none is detected, it sends out a technician to repair the ppt. Along with each affidavit was a dial tone report (DTR) indicating whether its remote testing system detected a dial tone during the inspection intervals, and logs of calls made from the ppts.

In the decision sustaining both violations, the hearing officer credited all the evidence. He found that evidence of detected dial tones and outgoing calls from the ppts did not address the underlying low volume, silent operator (summons 88) or the inoperable keypad (summons 46) problems.

1 The parties' arguments from an earlier unidentified hearing for other 67 RCNY § 6-05(b) violations were incorporated into this hearing. Petitioner's evidence for Summons 46 was not retained in the digital case file.

On appeal, Respondent's representative reasserts that the evidence shows that calls were made from the ppts in between the inspections. Therefore, Petitioner's evidence of single moments of inoperability was insufficient to prove the ppts were continuously inoperable for two 24-hour periods as 67 RCNY § 6-05(e)(2) requires for a violation. For the first time on appeal, Respondent argues that no ppt can be operable all the time given environmental factors and mishandling by the public. It adds details about its ppt monitoring and claims it documents its ppt repairs. However, per 48 RCNY § 6-19(f)(2), the Board will not consider any evidence, including factual assertions, not presented to the hearing officer.

Petitioner did not answer the appeal.

### **ISSUE ON APPEAL**

The issue on appeal is whether Respondent refuted that the ppts were continuously inoperable pursuant to 67 RCNY § 6-05(e).

### **APPLICABLE LAW**

Section 6-05(b) of 67 RCNY requires that a ppt be operated and maintained in a condition to enable a call to be completed when proper payment has been made and to provide access to operator service without use of a coin or other payment device.

Section 6-05(e) of 67 RCNY provides, in pertinent part:

(2) A [summons] may be issued for a violation of subdivision (b) of this section where inspections have disclosed that telephone service was unavailable on two occasions, each such occasion lasting for a duration of at least twenty-four (24) hours, within a period of ninety (90) calendar days. Each twenty-four hour period in which a failure to provide telephone service continues shall constitute a separate occasion on which an offense has occurred.

\* \* \* \* \*

(5) A violation shall be considered to have continued throughout a period specified in this subdivision when a condition set forth in subdivision . . . (b) . . . of this section has been identified upon at least two inspections that encompass such period within one hundred sixty-eight (168) hours; provided that, demonstration by an owner that the condition underlying such violation was corrected within such period shall be a defense to an action pursuant to § 6-05.

### **ANALYSIS**

For the following reasons, the Board reverses the hearing officer's decision.

On this record, the Board finds that Respondent refuted that the ppts were continuously inoperable. Under 67 RCNY § 6-05(e)(2), Petitioner may issue a violation of subsection (b) where inspections disclose that ppt service was unavailable on two occasions, each lasting for at least 24 hours within a 90 day period. Here, the IO's reports indicated that for summons 88 there was silence when he tried to reach the operator and the volume was low when calling 311 for inspections on March 20, 2019 at 2:51 p.m. and March 21, 2019 at 3:58 p.m., and on March 26,

2019 there no dial tone. For summons 46, the IO's reports indicated the ppt had inoperable keypads on March 14, 2019 at 8:10 a.m., March 15, 2019 at 10:29 a.m., and March 19, 2019 at 7:03 a.m. Therefore, Petitioner's evidence showed the ppts were continuously inoperable for two 24-hour periods from the date of the first inspections through the date of the third inspection under 67 RCNY § 6-05(e)(5). *See DOITT v. CityBridge LLC*, Appeal No. 2000160 (March 5, 2020). It then became Respondent's burden to refute the charge or establish a defense.

A defense to the violation may be established if the owner of the ppt can demonstrate that the underlying condition was corrected within the period between inspections. *See* 67 RCNY § 6-05(e)(5). Further, a ppt provider "may rebut a charge that a ppt did not have a dial tone through the use of *call records that show calls were made from the ppt* within the period between inspections." [Emphasis supplied] *See NYC v. BAS Communications, Inc.*, Appeal No. 0900277 (December 3, 2009). Here, the call log for summons 46 showed that eight calls, each over one minute long, were made from the ppt from the evening of March 15 through March 18, 2019. Therefore, the keypad was operating between the IO's second and third inspections, despite the IO's allegations. Even though Respondent's DTR for summons 88 confirms there was no dial tone on March 26, 2019, the call log shows that one call of almost two minutes was made on March 22, 2019. Consequently, Respondent's evidence refuted the allegation that there was no dial tone continuously during the interval between Petitioner's second and third inspections. *See DOITT v. City Bridge LLC*, Appeal No. 1600438 (June 30, 2016); *NYC v. BAS Communications, Inc.*, Appeal No. 0900665 (April 29, 2009).

Accordingly, the Board reverses the hearing decision and dismisses both summonses.

*By: OATH Hearings Division Appeals Unit*